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May 16, 1996

VIA HAND DELIVERY

Mr. William Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

RE: CC Docket No. 96-98

Dear Mr. Caton:

Please find enclosed for filing in the referenced docket the original and twelve copies of the Comments of the District of Columbia Public Service Commission. We are also delivering a copy directly to each of the Commissioners and Janice Myles.

Also enclosed is an additional copy that I would appreciate your date-stamping and returning to me with the messenger. Thank you for your kind assistance.

Sincerely,

Thomas R. Gibbon

Enclosures

cc: Ms. Janice Myles

No. of Copies rec'd 0+12
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Local	)	
Competition Provisions in the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	

COMMENTS OF THE DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION

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May 16, 1996

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Filed May 16, 1996

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SUMMARY

Sections 251 and 252 of the Telecommunications Act of 1996 are designed to facilitate competition in local telecommunications services. Section 251 specifies the duties of carriers in regard to providing access to and interconnection with their local telecommunications networks. The NPRM initially presents the issue of whether the FCC should adopt regulations to implement section 251 that would either severely minimize or expressly permit differences in regulation among the states. The statutory scheme requires FCC regulations that permit differences in state regulation.

The facts cited in the NPRM show that states have adopted diverse approaches to promote network access and interconnection. These approaches, for the most part, constitute alternative means of achieving the local competition goal of the new statute. Section 251(d)(3) of the 1996 Act contemplates that such approaches will be accommodated rather than excluded by the FCC's regulations.

The 1996 Act gives the FCC no authority to adopt regulations implementing the provisions of section 252 that are applicable to state commissions. For example, the statute contains standards to guide the states in ruling on just and reasonable rates. An

exclusionary approach would impermissibly replace those standards with a uniform pricing or costing methodology that all states would be required to follow.

The Commission's section 251 rules must permit state commissions to enforce other state requirements that are consistent with the purposes of the 1996 Act and necessary to accommodate varying local conditions and circumstances. In the District of Columbia, these conditions include below average residential subscription to telephone service as well as highly sophisticated use of telecommunications for business purposes. The efforts of the District of Columbia Public Service Commission (DCPSC) to promote local competition in ways that properly recognize these local conditions should not be hampered by the FCC's section 251 rules.

Even if the FCC could reasonably conclude that it has authority to adopt preemptive section 251 regulations, the FCC can and should reject that approach as a matter of policy. There is very limited experience thus far with local competition. In these circumstances, it is reasonable to choose a policy that permits continued experimentation with differing approaches at the state level in order to establish a broader base of experience for exclusive national requirements.

A number of important terms in Section 251, such as network features and functions, are undefined by the 1996 Act. In light

of these omissions, it is reasonable to conclude that Congress contemplated that the FCC would provide generally applicable definitions of those terms in its Section 251 regulations. State commissions will then use such definitions in carrying out their responsibilities to mediate and arbitrate interconnection agreements between carriers, and in ruling upon any statement of general terms and conditions for interconnection that may be filed by a Bell Operating Company with its state commission. The DCPSC proposes various general definitions of section 251 terms in its comments.

District of Columbia P.S.C.
Filed May 16, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF THE
DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION

I. INTRODUCTION

The District of Columbia Public Service Commission ("DCPSC") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned docket on April 19, 1996.[1] In the NPRM, the FCC solicits comments on the implementation of sections 251 and 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). These sections of the 1996 Act establish certain duties and obligations for telecommunications carriers, local exchange carriers ("LECs"), and incumbent LECs with respect to interconnection of telecommunications network facilities. They

[1] These comments do not address the discrete issues of Dialing Parity, Number Administration, Notice of Technical Changes and Access to Rights of Way. The NPRM (¶ 290) instructs the parties to file separate comments on those issues on May 20, 1996. The DCPSC will file such comments on that date.

also specify certain responsibilities of the FCC and state commissions to ensure compliance with such LEC obligations. The DCPSC exercises regulatory jurisdiction over the provision of telecommunications services within the District of Columbia. It is a state commission within the meaning of the statute. The DCPSC therefore has a direct and substantial interest in the outcome of this FCC proceeding. The DCPSC fully supports the pro-competitive goals of the 1996 Act. The DCPSC will take such actions as are necessary and feasible to achieve those objectives as rapidly as possible.

II. ANALYSIS

A. Scope of Commission's Regulations

1. Exclusive versus Inclusive Rules

The NPRM initially asks what overall approach the Commission should use to develop section 251 regulations. The issue presented is whether the regulations should permit no "significant variations" (¶ 27) or "material variability" (¶ 33) in state regulations regarding the access and interconnection obligations of local exchange carriers. In order to preclude "significant variations", the FCC would have to adopt rules "that significantly explicate in some detail the statutory requirements of sections 251 and 252." NPRM ¶ 33. State regulations would then have to essentially duplicate the FCC's regulations in order to be consistent with the "requirements" of the statute. The

Commission should reject such an approach because, as the DCPSC shows below, it would be contrary to the statutory scheme.

The structure of the section 251(d) implementation provision clearly contemplates preservation of state rules with respect to access and interconnection obligations of local exchange carriers. Section 251(d)(3), which is entitled "Preservation of State Access Regulations," provides:

> In prescribing and enforcing regulations to implement the requirements of this section the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that:
>
> > (A) establishes access and interconnection obligations of local exchange carriers;
> >
> > (B) is consistent with the requirements of this section; and
> >
> > (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

The NPRM correctly points out that section 251(d)(3) is designed to preserve existing state regulations. ¶ 157.

FCC regulations that permitted no "significant variation" in state regulations would make such preservation impossible. That would be so because there are significantly different existing regulations, orders, and policies of state commissions around the country pertaining to access and interconnection obligations of

LECs.[2] If the Commission adopted regulations that purported to define completely all section 251 "requirements," with which state regulations must be consistent under section 251(d)(3)(B), the FCC's regulations would necessarily preclude enforcement of some, and perhaps many, of the existing state regulations. That would be so even if the FCC chose one state's existing policy as the definition of a section 251 "requirement," because any other existing state rules that were different would then be inconsistent with the section 251 "requirement."

Moreover, this exclusionary approach would arbitrarily nullify all different existing state regulations, including those that are simply alternative means of achieving the goals of section 251. Such an approach would render section 251(d)(3) substantively meaningless. The exclusionary approach is therefore an unreasonable construction of the statute. Section 251(d)(3) is a constraint of the FCC's discretion in implementing section 251 and it must be treated as such by the Commission.

Even in the absence of the statutory constraint imposed by section 251(d)(3), exclusionary section 251 rules would be unreasonable for at least two reasons. First, the evidence cited

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[2] The NPRM cites differing state approaches in respect to methods of interconnection (NPRM ¶ 65), collocation policies (Id. ¶ 69), unbundling of network elements (Id. ¶¶ 81, 96, 100, 101, 109), pricing methodologies for interconnection (Id. ¶ 127), resale restrictions (Id. ¶¶ 177, 183-187) and reciprocal compensation (¶¶ 227-229).

in the NPRM does not support FCC rules from which there could be no significant variations in state rules. The evidence shows that states have followed diverse approaches in promoting local competition. If the same approach were best in all states, the evidence should at least show states moving toward uniformity. Moreover, the only support for an exclusionary approach cited in the NPRM are hypothetical benefits premised on untested theory.[3]

Second, as the NPRM implicitly concedes (¶ 261), exclusionary FCC rules could not in any event assure the hypothetical benefits of uniformity. Section 251(f)[4] confers exclusive authority on state commissions to exempt rural telephone companies from certain requirements of section 251(c), and to suspend or modify section 251(b) and (c) requirements for small LECs under certain conditions. Thus, even if it were lawful to adopt exclusionary section 251 regulations, state commissions could, for good cause, exempt small LECs from those regulations.

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[3] In adopting rules the Commission must base its decision on record evidence and it must explain a rational connection between that evidence and the choice made. Alltell Corp. v. F.C.C., 838 F.2d 551, 557 (D.C. Cir. 1988); United Video, Inc. v. F.C.C., 890 F.2d 1173 (D.C. Cir. 1989); 5 U.S.C. § 706(2)(A).

[4] Section 251(f) expressly provides that a state commission may exempt a rural telephone company from all requirements of Section 251(c) under certain conditions, and suspend and modify requirements of Section 251(b) and (c) for a LEC "with fewer than 2 percent of the nation's subscriber lines installed in the aggregate nationwide," under certain conditions.

An exclusionary approach would also be inconsistent with other relevant parts of the 1996 Act. For example, sections 252(e)(3) and (f)(2), expressly permit a state commission to establish and enforce other requirements of state law in its review of a negotiated agreement or filed statement. In addition, section 601(c)(1) of the 1996 Act states that no provision of the Act shall be construed "to modify, impair, or supersede... state...law unless expressly so provided in such Act."

Both the statutory scheme and the evidence cited in the NPRM support an inclusive rather than an exclusive approach to the Commission's section 251 regulations. Under an inclusive approach, differing state regulations that are alternative means of achieving the goals of the 1996 Act would be preserved as contemplated by section 251(d)(3). Such regulations would then serve as options that other state commissions could consider in assessing the most effective way to promote competition in light of local conditions.

The NPRM asks whether different regulatory approaches may be necessary to deal with "variations in technological, geographic, or demographic conditions" among local markets. ¶ 33. Such conditions in the District of Columbia are probably close to unique. This is a geographically small market in which the Federal Government is the dominating influence on

telecommunications use and development. The market includes a disproportionate number of high technology private business as well as government users of local telecommunications facilities. This sophisticated sector of the market may require the deployment of new local exchange technology in the District more rapidly than elsewhere. At the same time, the residential customer base in the District is relatively small, and residential subscription to telephone service remains below the national average. The latter fact combined with the sophisticated needs of the business and government sector may present unusual network design challenges. In order to achieve the 1996 Act's goals under these conditions, a highly tailored regulatory approach may be necessary.

A policy that permits variation in state regulations is consistent with Commission precedent. In the Telerent case,[5] the Commission issued a ruling that preempted a state commission's regulations that precluded interconnection of customer provided equipment ("CPE"). Interconnection of CPE at that time was permitted by AT&T's interstate service tariff, in accordance with FCC orders issued in the Carterphone case.[6] The AT&T tariff, however, provided for interconnection only through AT&T's interface device. Rather than imposing AT&T's interface as a

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[5] Telerent Leasing Corp., 50 FCC 2d 732 (1974).

[6] In re: Carterphone, 13 FCC 2d 420 (1968).

uniform nationwide policy, the FCC expressly permitted states to allow CPE interconnection through other less complicated and less expensive interface devices, such as the device which the New York Commission approved for use in the Rochester, New York service territory.[7] The FCC permitted such state actions because they promoted the pro-competitive purpose of the FCC's interconnection policy more effectively than AT&T's interstate tariff requirement.

The inclusive approach also properly distinguishes the "requirements" of the statute from the FCC's regulations. The Commission is required "to establish regulations to implement the requirements" of section 251 pursuant to section 251(d)(1). Other sections of the statute make it clear that such FCC rules may be viewed as part of the requirements of section 251, but not the exclusive requirements. For example, section 252(c)(1) directs state commissions to ensure that arbitration decisions "meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." If Congress had intended the FCC's rules to be exclusive, it would have directed the states to assure compliance with the requirements of section 251 "as defined by" rather than including the FCC's rules.

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[7] 50 FCC 2d at 734.

The inclusive approach further rejects an unjustified implicit premise of the exclusive approach, i.e., that without FCC rules to confine their discretion, state commissions will frustrate achievement of the objectives of the statute. The NPRM cites no evidence to support this premise. Instead, it shows a variety of state approaches designed to promote local competition. In addition, the statute requires state action to occur within prescribed time frames and thus precludes the frustration of competition by delayed state action. Moreover, if a state rule constitutes an unlawful barrier to entry, the FCC has authority to preempt such a rule under section 253. The exclusive approach to section 251 rules would impermissibly transform the FCC's authority to adopt implementing regulations into a device to preempt state regulatory discretion before it is exercised.

The NPRM requests comment on the fact that Congress did not amend section 2(b)[8] of the 1934 Act in granting the FCC authority to adopt implementing section 251 rules with respect to intrastate telecommunications service. The DCPSC agrees with the NPRM's conclusion that this fact does not preclude the FCC from

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[8] Section 2(b) of the 1934 Act provides that except as provided in certain sections, "nothing in [the Act] shall be construed to apply or to give the Commission jurisdiction with respect to...charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service[.]" 47 U.S.C. § 152(b).

adopting regulations that implement the requirements of section 251 in respect to intrastate communication. The Congress' decision not to amend section 2(b) of the 1934 Act is relevant, however, in determining the breadth of the FCC's authority under section 251. In the absence of express authority to regulate intrastate communications, the FCC has no authority. Thus, the Commission has no authority to adopt regulations to implement section 252 or section 251(f). The Commission may adopt rules that it would use in its default role under section 252 and any such rules could serve as non-binding guidelines for state commissions.

The NPRM points out that section 251 was enacted after section 2(b). The NPRM concludes that Congress therefore must have intended for section 251 "to take precedence over any contrary implications based on section 2(b)." This construction ignores that the section 2(b) prohibition is a "specific denial of agency authority to act" and because of section 2(b) the FCC "cannot act at all, let alone preempt state action, in connection with intrastate communication." People of State of Calif. v. F.C.C., 4 F.3d 1505, 1514 (9th Cir. 1993) (citing Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 370 (1986)) (emphasis added). Section 251 did not repeal Section 2(b). Therefore, the Commission has no authority under Section 251 to regulate intrastate communications, except to the extent such authority is

granted through express terms that evidence congressional intent to override the specific denial of such authority under section 2(b).

Assuming, arguendo, that the Commission could reasonably conclude that it has authority to adopt section 251 regulations that exclude variation in state regulation, it nonetheless can and should decline, as a matter of policy, to adopt such regulations. The experience with local competition to date is relatively brief and minimal. In these circumstances, it is reasonable to choose a policy that permits continued variety in state regulation in order to establish a broader range of experience on which to base exclusive national requirements.

Under an inclusive approach, the FCC would implement section 251 by providing in its regulations general definitions of terms in section 251 that are undefined by the statute. With the exception of "dialing parity" and "number portability," none of the service related terms in section 251 are defined by the 1996 Act. Such general definitions would be used by state commissions in carrying out their responsibilities under section 252.

Nationwide FCC rules that provide only general definitions will promote more rapid achievement of the local competition goal of the 1996 Act. More specific nationwide rules cannot account for varying local conditions and would therefore generate petitions to waive the FCC rules on account of such conditions.

As a result, there could be significant delays in determining carrier duties in the state where waivers are requested, and consequent delays in achieving the objectives of the 1996 Act. Nationwide FCC rules that provide only general definitions would avoid this potential logjam. Individual state commissions could then efficiently add the requirements necessary to account for local conditions in their respective states in order to achieve the pro-competitive goal of the 1996 Act most effectively.

2. Relationship Between Sections 251 and 252 and the Commission's Existing Enforcement Authority Under Section 208

The NPRM seeks comment on the relationship between sections 251 and 252 and the Commission's existing enforcement authority under section 208. NPRM ¶ 41. The NPRM asks whether the Commission's authority over complaints under section 208 also applies to complaints alleging violations of sections 251 or 252 ("section 251/252 complaints"). Id. The NPRM contemplates that authority over complaints arising under 251 or 252 may rest with state commissions rather than the FCC. Id.

The Commission's authority under section 208 must be read in light of the requirements of the 1996 Act. The 1996 Act contemplates that state commissions will have primary authority to enforce the requirements of section 251 in the context of mediating and arbitrating interconnection agreements under Section 252. Any alleged violation of section 251 or 252 would

likely be intertwined with issues being addressed by the state commission in mediation or arbitration. Those proceedings would be disrupted and delayed if a party were required to go outside the state commission to another forum to resolve a particular violation.

Even if a complaint did not relate directly to an issue pending in arbitration or mediation, state commissions should still have authority to hear the complaint because state commissions will likely be most familiar with the parties, facts and local circumstances involved in the alleged violation. It would also be less burdensome and costly for aggrieved parties to bring a complaint in their home state than at the federal level. Requiring section 251/252 complaints to be brought to state commissions will also reduce the Commission's administrative burden.

In any event, the FCC should not issue regulations requiring or permitting section 251/252 complaints to be brought only to the FCC because state commissions may wish to require such complaints to be brought before them. Any such requirement by state commissions would not be inconsistent with the 1996 Act because the 1996 Act does not require that such complaints be brought only to the FCC.

B. Obligations Imposed by Section 251(c) on Incumbent LECs

The NPRM seeks comments on whether state commissions are permitted to impose incumbent LEC obligations on non-incumbent carriers. ¶ 45. The NPRM indicates that some states have used a reciprocity rule to facilitate negotiations between the party requesting interconnection and the incumbent LEC, and asks whether such action undermines the pro-competitive goals of the 1996 Act. Id.

The statute cannot reasonably be read as a flat prohibition on state imposition of any incumbent LEC obligation on a party requesting interconnection. Whether the imposition of any particular obligation does or does not undermine the pro-competitive goals of the Act depends on the particular facts and circumstances of the case. If, in the example cited in the NPRM, the use of reciprocity was the sine qua non for agreement on the terms of interconnection, then the use of reciprocity would create competition and thus achieve the primary purpose of the 1996 Act.

1. Duty to Negotiate in Good Faith

The NPRM seeks comment on how the FCC should define the duty to negotiate interconnection agreements "in good faith" and, in particular, whether it should adopt a "good faith" standard.

The definition of "good faith" negotiation varies from state to state. Some states have adopted the Uniform Commercial Code

definition: "Honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103. However, states that have adopted the U.C.C. definition may also provide further definition in their statutes. Common law precedents also provide further elaboration. All states have not adopted the U.C.C. definition, and some may rely only on common law definitions. See, e.g., Gatoil (U.S.A.), Inc. v. Wash. Metro. Area Transit Auth., 801 F.2d 451 (D.C. Cir. 1986) (requiring application of the District of Columbia statutory good faith standard in place of the Maryland common law standard of "reasonable efforts"). Thus, there is no uniform precedent on which the Commission can rely to set a binding national standard for "good faith."

Even if there were such precedent, Congress did not intend the Commission to adopt such a standard. The interconnection agreements to which the standard applies are essentially local service agreements to which the commercial law of the affected state would normally apply. Nothing in the 1996 Act suggests an intent to replace those standards with a federal standard. The only circumstance in which the Commission might reasonably replace a state standard with a federal standard would be on a showing that a particular state's standard constituted a barrier to entry within the meaning of section 253.

The Commission could, however, adopt a definition of "good faith" that it would use if it were required to assume a state's responsibilities under section 252 because of a failure to act by the state. Since the Commission would be acting in a particular state's stead, however, it would be reasonable for the Commission to use that state's standard of "good faith," unless it determines that the state's standard constitutes an entry barrier. In the latter case, it would be reasonable for the Commission to substitute, for example, the U.C.C. definition.

Thus, the only national guideline that seems reasonable here is that "good faith" should be defined by the standard of the affected state, unless that standard is shown to be a barrier to entry, in which case the U.C.C. standard should apply. It should be noted that if either party to a negotiation believes the other is not negotiating in good faith, the aggrieved party can request and is entitled to mandatory arbitration of the agreement. The state commission would then establish the terms of the agreement, through arbitration, and the issue of whether prior negotiation has been in good faith would be irrelevant to that determination. It is possible that a failure to negotiate in good faith is a punishable violation of the 1996 Act (and any implementing state regulations).[9] In a proceeding to adjudicate such a claim, the

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[9] Section 502 of the 1934 Act provides that "[a]ny person who willfully and knowingly violates any rule" of the Commission (continued...)

substantive standard for determining good faith would be relevant.

2. Interconnection, Collocation and Unbundled Elements

a. Interconnection

The NPRM solicits comment on whether the FCC should define the incumbent LEC obligation to provide "interconnection" under section 251(c)(2) differently from the obligation of all LECs to provide "transport and termination" under section 251(b)(5).[10] The NPRM points out that the pricing standards in section 252(d)(2) for each obligation are different.

The DCPSC tentatively agrees with the NPRM's suggestion that "interconnection" as used in section 251(c)(2) refers only to facilities and equipment physically linking two networks. Such a definition would treat interconnection here like interconnection was originally treated for CPE. The incumbent LEC provided, for a charge, an interface between its network and the CPE; that interface served as the point of interconnection. Here, the incumbent LEC will provide, for a charge, a means for interconnection with a competing company's facilities.

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[9](...continued)
shall be punished by a fine of not more than $500 per day of the offense. 47 U.S.C. § 502.

[10] Our comments in connection with the scope of the Commission's regulations are responsive to the matters raised in paragraphs 49-52 of the NPRM.

(1) Technically Feasible Points of Interconnection

The NPRM seeks comment on how the FCC should define the obligation of the incumbent LEC under section 251(c)(3) to provide interconnection at any "technically feasible" point within the incumbent LEC's network. The NPRM seeks to avoid a static definition that will not accommodate changes in technology.

The DCPSC tentatively suggests that a "technically feasible point" should be defined as a point where interconnection can be provided with currently available technology in a manner that will not adversely affect the operation of the incumbent LEC's network. If an incumbent LEC refuses to provide interconnection at a requested point, it should have the burden of explaining why currently available technology does not permit interconnection at that point. Unresolved disputes between incumbent LECs and parties requesting interconnection regarding technically feasible points should be presented to state commissions pursuant to section 252 as an issue for arbitration on the basis of the facts presented.

(2) Just, Reasonable, and Nondiscriminatory Interconnection

The NPRM seeks comment on how to determine whether the terms and conditions for interconnection arrangements are just, reasonable and non-discriminatory. The FCC has defined non-